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[2] Pentakrifan yang lebih wajar akan klausa 17 ialah, memandangkan sebarang notis boleh disampaikan dengan menghantarnya melalui pos yang dialamatkan kepada alamat terakhir penerima; peruntukan yang menyifatkannya

adalah terpakai kepada notis tersebut, sama ada atau tidak ia dihantar melalui pos berdaftar AT. Adalah tidak perlu untuk perayu menunjukkan bahawa kad AT telah diakui penerimaannya dengan sempurna bagi membentuk penyampaian yang berkesan akan notis tuntutan. Adalah mencukupi bagi perayu untuk menunjukkan bahawa notis tersebut telah dialamatkan dengan betul, berbayar dahulu dan dihantarserah ke pejabat pos dan diakui untuk penyampaian oleh pihak pos. Apabila fakta-fakta ini telah terbukti, maka peruntukan menyifatkan akan pasti terpakai.

[3] "Hendaklah disifatkan" dalam klausa 17 jelas untuk bermaksud "hendaklah disifatkan sebagai".

[Rayuan dibenarkan].

Cases referred to:

Public Bank Bhd. v. Rasatulin Holdings Sdn. Bhd. & Ors. [1989] 1 MLJ 47 (**not foll**)

The Co-operative Central Bank Ltd. v. Dato' Seri Mohd. Adib Mohd. Adam & Ors. (Unreported) (**foll**)
MB Finance Bhd. v. Hasmat Properties Sdn. Bhd. & Ors. [1990] 1 MLJ 180 (**cit**)

Kong Ming Bank Bhd. v. Leong Ho Yuen [1982] 2 MLJ 111 (**cit**)

Bank Bumiputra Malaysia v. Esah binti Abdul Ghani [1986] 1 MLJ 16 SC (**cit**)

Lloyd's v. Harper [1880] 16 Ch D 290 (**cit**)

T.O. Supplies (London) LD v. Jerry Creighton LD [1952] 1 KB 42 (**foll**)

Canadian Imperial Bank of Commerce v. Heley [1979] 100 DLR (3d) 470 (**foll**)

Rex v. Westminster Unions Assessment Committee, Ex parte Woodward & Sons [1917] 1 KB 832 (**foll**)

Legislation referred to:

Valuation (Metropolis) Act 1869, s. 65

Other sources referred to:

The Modern Contract of Guarantee, O'Donovan & Phillips, 1985 Edn., p. 145

For the appellant - Benjamin John Dawson (Wong Kok Leong with him); M/s. Nik Hussain & Partners

For the respondent - T. J. Su (Teh Meng Teik with him); M/s. Cheah Teh & Su

JUDGMENT

Mohamed Dzaiddin bin Hj. Abdullah SCJ:

This appeal concerns an interpretation of a clause in a letter of guarantee dealing with the service of a notice of demand. The material clause in the guarantee states as follows:

17. Any notice may be served on the undersigned or his/their executors administrators

a or legal representatives either personally or by sending the same through the post in an envelope addressed to the last known place of address of the person to be served and a notice so sent shall be deemed to be served on the day following that on which it is posted.

b The respondent, who was the second defendant in the action, was sued under the letter of guarantee dated 3 October 1984 (the said guarantee following the default of the principal borrowers, whereby, as a director, he guaranteed to pay the appellant bank all sums due and owing under a revolving bankers acceptance facility granted by the bank to the principal borrowers. His liability was, however, limited to RM2.0 million. Being an "on demand" guarantee, the appellant's solicitors sent him a notice dated 4 March 1988 by AR registered post to his last known address, demanding payment of the amount owing. On 19 May 1988, the bank issued a writ against the guarantors, which was followed with the filing of the statement of claim. By paragraph 4 of the amended statement of claim, the bank alleged that a demand for payment was made to the respondent by the solicitors' letter of 4 March 1988. The respondent denied this allegation in paragraph 12 of the amended defence and put the appellant to strict proof thereof. At the trial of the action, which was confined to the respondent, the learned trial Judge held that there was an issue to be tried on the notice of demand. She stated that the burden was on the bank to prove that the said notice had been sent to and received by the respondent. Hence, the appellant adduced evidence showing that the notice, which was sent by AR registered post, was properly addressed, prepaid and delivered to the post office and acknowledged receipt by the postal authority on 9 March 1988. The appellant also established that the respondent resided and continued to reside at the same address stated in the said guarantee at the date when the notice of demand was sent. In the circumstances, it was contended on behalf of the appellant that by the deeming provision of cl. 17, the said notice of demand was received by the respondent on 10 March 1988, a day after the postal authority acknowledged receipt of the said notice for service despite the non-return of the AR card. The learned Judge rejected the above argument.

i In dismissing the bank's claim on the ground of non-effective service of the notice of demand, and therefore no cause of action having been

- a** undelivered. The bank chose to send the letter of demand by AR registered post where the retour card was not returned. It was argued that since the deeming provision was for letters of demand to be sent by registered post, sending a letter by AR registered post was ineffective.
- b** V.C. George J. rejected this contention and held that based on the principle that “the greater” would include “the lesser”, and that the AR registered post was “a more sophisticated version of the ordinary registered post”, sending the letter of demand by AR registered post amounted to sending it by registered post within the meaning of the deeming provision in the loan agreement.
- c** In distinguishing the *Cooperative Bank’s* case, the learned Judge seemed to have perceived the principle adopted by George J. differently in the present case. She accepted that sending a letter by AR registered post was greater and not lesser than sending it by ordinary post.
- d** However, as “the postman must obtain an acknowledgment of receipt of the letter on the AR card in the case of the former but not in the case of the latter”, it seemed to her that only upon the return of the AR card that it could truly be said that the letter of demand had been effectively served on the guarantor.
- e** In *MBf Finance Bhd. v. Hasmat Properties Sdn. Bhd. & Ors.* [1990] 1 MLJ 180, a notice of demand was sent by AR registered post, contrary to the provision in the guarantee, which required it to be sent by registered post. The Court held, *inter alia*, that in the absence of AR
- f** card, the letter of demand was not served on one of the guarantors.
- In this appeal, the complaint of the appellant was that the learned Judge should have decided that the appellant had proved that the notice of demand dated 4 March 1988 was delivered to the respondent. In this respect, the thrust of
- g** Encik Dawson’s submission, both in the Court below and before us, was that since the notice of demand was correctly addressed, prepaid and delivered to the post office and acknowledged by the postal authority, a presumption arose that the said notice had reached the respondent at
- h** the given address and was deemed to have been received by him on the following day, a day after the postal authority acknowledged receipt of the notice for service. It was then for the respondent to rebut this presumption, where, by his absence at the trial, he had failed to do so. Counsel
- i** commented that the learned Judge seemed to require the appellant to prove strictly that the

notice of demand had been effectively served on the respondent by the return of the AR card with the acknowledgment of receipt. Counsel also submitted that the learned trial Judge was wrong in holding that the deeming provision in clause 17 was only good for ordinary post.

The central issue in the present appeal is whether on the proper construction of cl. 17 of the said guarantee it could be held that it is sufficient to prove that the notice of demand was duly served on the respondent by sending the same through the post in an envelope addressed to the last known place of address of the respondent, and that it is irrelevant whether it was sent by registered post or by AR registered post or, as was held by the learned Judge, that the deeming provision only applies to a notice sent by ordinary post and that since the appellant has taken on the added responsibility of sending the notice by AR registered post, it is only upon the return of the AR card with an acknowledgment of receipt that the said notice has been effectively served on the respondent. With respect, we do not agree with the finding of the learned Judge. In construing the words of the guarantee, in our view, the learned Judge should have adopted a liberal approach by giving a reasonable construction to them, having regard to the surrounding circumstances (*Kong Ming Bank Bhd. v. Leong Ho Yuen* [1982] 2 MLJ 111; *Bank Bumiputra Malaysia Bhd. v. Esah binti Abdul Ghani* [1986] 1 MLJ 16 SC, following the judgment of Fry J. in *Lloyd's v. Harper* [1880] 16 Ch. D 290. O'Donovan & Phillips, in their treatise on the law of guarantee, **The Modern Contract of Guarantee**, 1985 Edn., stated at p. 145 as follows:

Thus the guarantee should be given a reasonable, business meaning and should not be construed so as to render the guarantee ineffective or illusory. The weight of authority between this "liberal" method of construction and the *contra proferentem* approach taken by Sheppard J. in *Scholefield Goodman and Sons Ltd. v. Gange* (Unreported. [Supreme Court of New South Wales, 4 December 1979]) is almost equally divided. The different views might well be the result of the differing contexts in which the guarantee is given, a more liberal view being taken where the guarantee is given by directors in the context of a major commercial transaction and the *contra proferentem* view being advanced where the guarantee is given in respect of a consumer transaction. On balance it is considered that the Courts will in the future be more likely to

- a interpret guarantees in the same way as any other commercial agreement rather than to apply a strict *contra proferentem* rule to their construction while, at the same time, acknowledging that guarantees have to be interpreted with reasonable regard for the extent of the guarantor's obligation.
- b Bearing in mind the above principle, the learned Judge ought to have given the word "post" its ordinary and natural meaning and, in the context of cl. 17, should not have made a distinction between an ordinary post and an AR registered post. In *T.O. Supplies (London) LD. v. Jerry Creighton LD.* [1952] 1 KB 42, Devlin J. (as he then was) stated at p. 45:
 - It appears to me that the word "post" in its ordinary and natural meaning is wide enough to cover both registered and ordinary post, and I do not think that it is possible to limit it to one or the other.
- d A letter which is carried through the post, whether registered or not, is still "posted" in the ordinary sense, and registration is merely one way of posting a letter.
- e In the light of the meaning of the word "post" stated above, it follows that a notice which is sent by post, whether registered or not, is still "posted" in the ordinary sense of the word, and in the instant case, the fact that the notice of demand was sent by AR registered post would not make any difference since registration is merely one way of sending a letter. It must, however, be borne in mind that the mode of service of a notice of demand in a given case will depend on the words of the relevant clause in the guarantee, as it is quite common for the guarantee to expressly provide the manner in which a notice is to be given to the guarantor. See *The Cooperative Central Bank Ltd. (supra)* and *MB Finance Bhd (supra)* where, in both cases, the notice of demand was required to be sent by registered post. Or there may be instances where a clause in a guarantee may provide the mode of service by prepaid AR registered post. Be that as it may, the practical effect of sending a letter by registered post is quite apparent. It provides evidence of the posting and in the case of AR registered post, to borrow George J's words, "it is just a sophisticated version of the ordinary registered post."
- h Therefore, on the proper construction of cl. 17, since any notice may be served by sending the same through the post addressed to the last known address of the addressee, in our view, the
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deeming provision applies to the said notice, whether or not it is sent by AR registered post. Cl. 17 does not provide that the notice should either be sent by registered post or AR registered post, and the fact that these words were omitted from cl. 17 cannot justify the Court reading those words in cl. 17 as was done by the learned Judge. In the context of cl. 17 of the said guarantee, we are further of the view that it is not necessary that the appellant must show that the AR card has been returned duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established, the deeming provision will inevitably apply.

On the meaning of the words “shall be deemed” in cl. 17, it would seem clear to us from the authorities that they mean “shall be regarded as”. There are very few decided cases on the meaning of the word “deemed” when used in a deed. However, in *Canadian Imperial Bank of Commerce v. Haley* [1979] 100 DLR (3d) 470, the New Brunswick Supreme Court, Appeal Division, was called upon to decide on the meaning of these words “shall be deemed” in cl. 10 of the guarantee, which reads:

(10) That the guarantor shall make payment to the Bank of the amount of the liability of the guarantor forthwith after demand therefor is made in writing and such demand **shall be deemed** to have been effectually made when an envelope containing it addressed to the guarantor at the last address of the guarantor known to the Bank is deposited, postage prepaid and registered, in the post office and the liability of the guarantor shall bear interest at the rate of 8% per annum from the date of such demand.
(Emphasis added).

In dismissing the Bank's claim, the trial Judge held that the demand was not effectual because the defendant did not actually receive the demand and he interpreted “deemed” to mean “rebuttably presumed”. Hughes, CJ, delivering the judgment of the Court, stated at p. 475 as follows:

With every respect to the learned trial Judge's conclusion, I find myself unable to agree with his interpretation of the words “shall be deemed” in cl. 10 of the guarantee. In

a *Hickey v. Stalker et al.*, [1924] 1 DLR 440, 53 OLR 414 (Ont. CA), the meaning of these words, which were used in the Mechanics' and Wage Earners' Lien Act, were brought into issue. It was said by Meredith, CJCP, at p. 442, that the expression may mean “deemed conclusively” or “deemed until the contrary is proved”. Middleton J., said at p. 444:

b It may but does not always mean “adjudged and determined”. Certainly, when the doing or abstaining from doing a particular thing is to be “deemed” to have a particular consequence, this is a very natural meaning, though the same result might be attained by attributing to it the meaning “shall be regarded as”. So, when an appeal which is not set down in time is to be “deemed to be abandoned”, it does not require much imagination to find an intention on the part of the Legislature to say that such an appeal shall be regarded as abandoned, and make it the duty of the Court to “adjudge and determine” that it was abandoned” *Re Rodgers and MaFarland*, 19 OLR 622.

c The practical necessity for a deeming provision such as that in cl. 10 in a form of guarantee used by a bank where personal contact with its guarantors is not always feasible, is readily apparent. In my opinion the words “shall be deemed” in cl. 10 are the equivalent of “shall be regarded as”, and consequently the fact that the defendant did not actually receive the demand, which the Bank had sent him pursuant to cl. 10, is immaterial and can afford no defence to the action.

d In *Rex v. Westminster Unions Assessment Committee, Ex parte Woodward & Sons* [1917] 1 KB 832, the appellate division of the King's Bench considered the meaning of the words “shall be deemed to have been served and received” as used in s. 65 of the Valuation (Metropolis) Act 1869, which reads:

e All orders and notices under this Act ... shall be in writing or print, or partly in writing and partly in print ... and all orders, notices and documents required ... to be served on or sent to any person or body of persons corporate or unincorporate may be either delivered to such person or the clerk of such body, or left at the usual place of abode of such person or clerk, or at the office of such clerk or body, or (if such abode or office cannot on reasonable inquiry be discovered) at the premises to which the order, notice, or document refers.

f They may also be served and sent by post, by a prepaid letter, addressed to such person, or

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to the office of such body or to their clerk, and, if sent by post, **shall be deemed** to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post.
(Emphasis added).

Viscount Reading CJ at page 838 said:

A notice prepaid and addressed as directed by s. 65 if sent through the post 'shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post'. That provision applies to a case where in fact the notice has not been received, otherwise it has no meaning. The intention is to treat as a fact something which has not been established as a fact - even something which can be shown not to be a fact. The section continues: 'and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post.' In my view, when those conditions have been performed it must be taken as concluded that the notice has been served and received...

Although the words "shall be deemed" in the above case was considered in the context of the statutory provisions, in our view, we can draw an analogy from this case that, in the present appeal, it is sufficient to prove the notice of demand by sending it through the post in an envelope addressed to the last known place of address of the defendant, and once this is established the deeming provision would apply as in the case cited above.

For reasons stated above, in our judgment, on the true construction of cl. 17 of the guarantee, the notice of demand sent by AR registered post and acknowledged receipt for service by the postal authority on 9 March 1988 was effectively served on the respondent on the following day, despite the non-return of the retour card by virtue of the deeming provision therein. In the result, the appellant had established a cause of action against the respondent. Accordingly, we allow this appeal, and with the consent of the parties, we make no order as to costs. The deposit will, however, be refunded to the appellant.

a EIKOBINA (M) SDN. BHD.

v.

**MENSA MERCANTILE (FAR EAST)
PTE. LTD.**

**b SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HARUN BIN MAHMUD
HASHIM SCJ,**

**DATO' PEH SWEE CHIN SCJ,
DATUK WIRA WAN YAHYA BIN PAWAN
TEH SCJ**

[CIVIL APPEAL NO. 03-25 OF 1992]

4 FEBRUARY 1994

c

CONTRACT: Assessment of damages - Assessment valued at date of breach or date of trial - Loss of profit - Remoteness of damages - Whether goods readily available in market.

d The appellant sued the respondent for failure to deliver 24 units of heavy construction equipment. The trial Judge discretionally declined to grant specific performance, but instead, awarded damages for breach of contract and costs to the respondent, dismissing at the same time the appellant's counterclaim. An appeal against the learned Judge's decision to the Supreme Court was dismissed and ordered (a) damages to be assessed and (b) for damages "on loss of agency rights" over other units of equipment.

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The learned Registrar assessed damages as follows:

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- (i) Loss of profit at RM1,766,429
- (ii) Loss of sale commission at RM150,000 (in respect of loss of agency rights)
- (iii) "Loss of opportunity" at RM456,000

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On appeal to the learned trial Judge, the damages aforesaid were confirmed except that loss of commission was reduced from RM150,000 to RM120,000. The appellants appealed against the above award of damages as assessed. However loss of sale commission was abandoned.

Held:

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[1] In the instant appeal, the normal circumstances were there, viz. and especially that goods similar to the goods in question were readily available at the market at the time of breach, that is, at the time when the goods in question ought to have been delivered or, if no time was fixed, then at the time of refusal to deliver the goods in question. The normal measure of damages ought to apply, that is, damages

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